108TH CONGRESS
2d Session
HOUSE OF REPRESENTATIVES
REPORT
108–742

NATIVE HAWAIIAN GOVERNMENT REORGANIZATION ACT OF 2004

OCTOBER 6, 2004.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. POMBO, from the Committee on Resources, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 4282]

[Including cost estimate of the Congressional Budget Office]

The Committee on Resources, to whom was referred the bill (H.R. 4282) to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of Native Hawaiian governing entity, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The purpose of H.R. 4282 is to express the policy of the United States regarding the United States relationship with Native Hawaiians and to provide a process for the recognition by the United States of the Native Hawaiian governing entity, and for other purposes.

BACKGROUND AND NEED FOR LEGISLATION

On January 17, 1893, with the assistance of the United States Minister and U.S. Marines, the government of the Kingdom of Hawaii was overthrown. One hundred years later, a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government and

calling for a reconciliation of the relationship between the United States and Native Hawaiians was enacted into law (Public Law 103–150). What is often now called "The Apology Resolution" acknowledges that the overthrow of the Kingdom occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished to the United States their claims to their inherent sovereignty as a people over their national lands, either through their government or through a plebiscite or referendum.

In December 1999, the Departments of the Interior and Justice initiated a process of reconciliation in response to the Apology Resolution by conducting meetings in Native Hawaiian communities on each of the principal islands in the State of Hawaii, culminating in two days of open hearings. The resulting draft report was issued on October 23, 2000, by the two departments and was called "From Mauka to Makai: The River of Justice Must Flow Freely." The principal recommendation contained in the Clinton Administration's report is set forth below:

> Recommendation 1. It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice pursuant to Public Law 103–150 (1993), that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, this report recommends that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations, the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body. Within this report, the Departments recommended "that the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes." Further, they stated that "Congress should enact further legislation to clarify Native Hawaiians" political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body."

H.R. 4282 provides a process for the reorganization of a Native Hawaiian government for the purpose of carrying on the government-to-government relationship mentioned in the report above. In particular, the Secretary of the Interior must certify that the organic governing documents of the Native Hawaiian government are consistent with federal law and the trust relationship between the United States and tribes of the United States. This certification is

important as the Supreme Court issued a ruling in the case of *Rice* v. *Cayetano* wherein the quasi-sovereign state agency, the Office of Hawaiian Affairs, was to open the election of its trustees to all of the citizens of the State of Hawaii who are otherwise eligible to vote in statewide elections. This, in essence, meant that the native people of Hawaii were divested of the mechanism that was established under the Hawaii State Constitution that had enabled them to give expression to their rights as native people to self-determination and self-governance.

The current Office of Hawaiian Affairs in Hawaii has existed since 1978 and will remain relevant with the enactment of H.R. 4282. This is because the Office administers programs and services with revenues derived from lands which were ceded back to the State of Hawaii upon its admission into the United States. The dedication of these revenues reflects the provisions of the 1959 Hawaii Admissions Act, which provides that the ceded lands and the revenues derived therefrom should be held by the State of Hawaii as a public trust for five purposes—one of which is the betterment of the conditions of Native Hawaiians. The Admissions Act also provided that the new State assumes a trust responsibility for approximately 203,500 acres of land that had previously been set aside under federal law in 1921 for Native Hawaiians in the Hawaiian Homes Commission Act.

This legislation will continue to reflect the separate funding authorities that Native Hawaiians have enjoyed since 1910; since this date, Congress has enacted over 160 statutes designed to address the conditions of Native Hawaiians. Thus appropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives.

It is also important to note that some have questioned whether the reorganization of a Native Hawaiian government might have implications for gaming that is conducted under the authority of the Indian Gaming Regulatory Act (IGRA). The scope of gaming that can be conducted under IGRA is determined by the law of the State in which the Indian lands are located. The U.S. Supreme Court has held that State laws which criminally prohibit certain forms of gaming apply on Indian lands. Moreover, there are no Indian tribes in the State of Hawaii, nor are there any Indian reservations or Indian lands. Further, Hawaii is one of only two States in the Union (along with Utah) that criminally prohibit all forms of gaming. Accordingly, a reorganized Native Hawaiian government could not conduct any form of gaming in the State of Hawaii.

H.R. 4282 is legislation similar to H.R. 617, introduced by Congressman Neil Abercrombie during the 107th Congress. Similar legislation was also introduced during previous Congresses. The Committee, along with the Senate Indian Affairs Committee, held five days of hearings on this issue during the second session of the 106th Congress, and in the 107th Congress, H.R. 617 was reported to the House of Representatives by a voice vote.

COMMITTEE ACTION

H.R. 4282 was introduced on May 5, 2004, by Congressman Neil Abercrombie (D–HI). The bill was referred to the Committee on Re-

sources. On September 15, 2004, the Full Resources Committee met to consider the bill. No amendments were offered and H.R. 4282 was then ordered favorably reported to the House of Representatives by unanimous consent.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Cited as the "Native Hawaiian Government Reorganization Act of 2004."

Section 2. Findings

This section sets forth Congress' findings. Findings (1) through (4) reflect Congress' recognition of Native Hawaiians as the native people of the United States and Hawaii. Findings (5) through (7) reflect Congress' determination of the need to address the conditions of Native Hawaiians through the Hawaiian Homes Commission Act of 1920. Findings (8) and (9) reflect Congress' establishment of the Ceded Lands Trust as a condition of statehood for the State of Hawaii. Finding (10) reflects the importance of the Hawaiian Home Lands and Ceded Lands to Native Hawaiians as a foundation for the Native Hawaiian community for the cultural survival of the Native Hawaiian people. Finding (11) notes that Native Hawaiians have maintained other distinctly native areas. Findings (12) through (14) reflect the effect of the Apology Resolution. Findings (15) through (19) reflect the Native Hawaiian community as a "distinctly" native community. Finding (20) reflects the position of the United States before the U.S. Supreme Court in the case of *Rice* v. *Cayetano*. Findings (21) and (22) reaffirm the special trust relationship between the Native Hawaiian people and the United States.

Section 3. Definitions

This section sets forth definitions of terms used in the bill. Defined terms are: Aboriginal, Indigenous, Native People; Apology Resolution; Ceded Lands; Indigenous, Native People; Interagency Coordinating Group; Native Hawaiian; Native Hawaiian Governing Entity; and Secretary.

Section 4. United States policy and purpose

This section reaffirms that Native Hawaiians are an aboriginal, indigenous, native people with whom the United States has a trust relationship and states Congress' intent to provide a process for federal recognition of a Native Hawaiian governing entity for purposes of continuing a government-to-government relationship.

Section 5. United States Office for Native Hawaiian Relations

This provision authorizes the establishment of the United States Office for Native Hawaiian Relations within the Office of the Secretary of the Department of the Interior. The United States Office for Native Hawaiian Relations is charged with: (1) effectuating and coordinating the special trust relationship between the Native Hawaiian people and the United States; (2) continuing the process of reconciliation; (3) conducting meaningful, regular, and appropriate consultation with the Native Hawaiian people and Native Hawai-

ian governing entity regarding any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands; (4) consulting with the Native Hawaiian Coordinating Group, other federal agencies, and with the State of Hawaii on policies, practices, and proposed actions affecting Native Hawaiian resources, rights, or lands; and (5) preparing and submitting to the Senate Committee on Indian Affairs, Senate Committee on Energy and Natural Resources, and House Resources Committee an annual report detailing the Interagency Coordinating Group's activities regarding the reconciliation process, consultation with the Native Hawaiian people, and recommendations of necessary changes to existing federal statutes.

The United States Office for Native Hawaiian Relations would serve as a liaison between the Native Hawaiian people and the United States for the purposes of assisting with the process of federal recognition of the Native Hawaiian governing entity, continuing the reconciliation process, and ensuring proper consultation with the Native Hawaiian people for any federal policy impacting Native Hawaiians. The United States Office for Native Hawaiian Relations would not assume the responsibility or authority for any of the federal programs established to address the conditions of Native Hawaiians. All federal programs established and administered by federal agencies will remain with those agencies.

Section 6. Native Hawaiian Interagency Coordinating Group

This section recognizes that because federal programs authorized to address the conditions of Native Hawaiians are largely administered by federal agencies other than the Department of the Interior there is a need to establish an Interagency Coordinating Group to be composed of officials from each federal agency that administers Native Hawaiian programs, establishes or implements policies that affect Native Hawaiians, or whose actions may significantly or uniquely impact on Native Hawaiian resources, rights, or lands. The primary responsibility of the Interagency Coordinating Group is to coordinate federal policies or actions that affect Native Hawaiians or impact Native Hawaiian resources, rights, or lands. The Interagency Coordinating Group is also charged with assuring that each federal agency develop a Native Hawaiian consultation policy and participate in the development of the report to Congress.

Section 7. Process for the recognition of the Native Hawaiian governing entity

This section recognizes the right of the Native Hawaiian people to organize for their common welfare and to adopt appropriate organic governing documents. This section provides the process for federal recognition of the Native Hawaiian governing entity.

Upon the organization of the Native Hawaiian governing entity, the adoption of organic governing documents, and the election of officers of the Native Hawaiian governing entity, the duly elected officers of the Native Hawaiian governing entity submit the organic governing documents to the Secretary of the Interior for certification. Within 90 days of the submission of the organic governing documents, the Secretary shall certify that the organic governing documents: establish the criteria for citizenship in the Native Hawaiian governing entity; were adopted by a majority vote of the

citizens of the Native Hawaiian governing entity; provide for the exercise of governmental authorities by the Native Hawaiian governing entity; provide for the Native Hawaiian governing entity to negotiate with federal, State, and local governments, and other entities; prevent the sale, disposition, lease, or encumbrance of lands, interests in lands, or other assets of the Native Hawaiian governing entity without the consent of the Native Hawaiian governing entity; provide for the protection of the civil rights of the citizens of the Native Hawaiian governing entity and those subject to the authority of the Native Hawaiian governing entity; and are consistent with applicable federal law and the special trust relationship between the United States and Native Hawaiians.

It is also important to note that one of the changes in H.R. 4282 from previous versions of this legislation centers on the creation of a Native Hawaiian Commission that will prepare, maintain, and certify a roll of Native Hawaiian community members. Those included on this roll will participate in the reorganization of the Native Hawaiian governing entity and will be included in the Native Hawaiian definition in Section 3 (8). Previously this role was to be certified by the Secretary of the Interior.

Within 90 days of the submission of the organic governing documents, the Secretary shall also certify that the State of Hawaii supports the recognition of the Native Hawaiian governing entity by the United States as evidenced by a resolution or act of the Hawaii State Legislature.

If the Secretary, after receipt of the organic governing documents, determines that the documents are deficient in addressing the matters stipulated under Section 6(b)(2)(A)(i) through (vii), or determines that any provision of the organic governing documents does not comply with any other applicable federal law, the Secretary shall return the organic governing documents to the Native Hawaiian governing entity. The Secretary shall identify to the Native Hawaiian governing entity each provision that is determined to be deficient or in noncompliance and provide a justification for each finding. The Native Hawaiian governing entity is authorized to amend the organic governing documents to ensure their compliance with this Act and may resubmit the organic governing documents to the Secretary for certification.

The certifications shall be deemed to have been made if the Secretary has not acted within 90 days of the date that the duly elected officers of the Native Hawaiian governing entity have submitted the organic governing documents of the Native Hawaiian governing entity to the Secretary.

Upon election of the Native Hawaiian governing entity's officers and the certifications (or deemed certifications) by the Secretary, federal recognition is extended to the Native Hawaiian governing entity.

Section 8. Reaffirmation of delegation of federal authority; negotiations; claims

This section reaffirms the United States' delegation of authority to the State of Hawaii in the Admissions Act to address the conditions of the indigenous, native people of Hawaii. Upon federal recognition of the Native Hawaiian governing entity, the United States is authorized to negotiate with the State of Hawaii and the

Native Hawaiian governing entity regarding the transfer to the Native Hawaiian governing entity of lands, resources and assets dedicated to Native Hawaiians.

This section provides that nothing in this Act is intended to serve as a settlement of any claims against the United States.

Section 9. Applicability of certain federal laws

This section states that nothing in this Act shall be construed as an authorization for the Native Hawaiian governing entity to conduct gaming activities under the authority of the Indian Gaming Regulatory Act or for eligibility to participate in any programs and services provided by the Bureau of Indian Affairs.

Section 10. Severability

This section provides that should any section or provision of this Act be deemed invalid, the remaining sections, provisions, and amendments shall continue in full force and effect.

Section 11. Authorization of appropriations

This section authorizes the appropriation of such sums as may be necessary to carry out the activities authorized.

COMMITTEE OVERSIGHT FINDINGS AND RECOMMENDATIONS

Regarding clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee on Resources' oversight findings and recommendations are reflected in the body of this report.

CONSTITUTIONAL AUTHORITY STATEMENT

Article I, section 8 of the Constitution of the United States grants Congress the authority to enact this bill.

COMPLIANCE WITH HOUSE RULE XIII

1. Cost of Legislation. Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out this bill. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974.

2. Congressional Budget Act. As required by clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974, this bill does not contain any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

3. General Performance Goals and Objectives. As required by clause 3(c)(4) of rule XIII, the general performance goal or objective of this bill is to express the policy of the United States regarding the United States relationship with Native Hawaiians, to provide a process for the reorganization of a Native Hawaiian government and the recognition by the United States of the Native Hawaiian government, and for other purposes.

4. Congressional Budget Office Cost Estimate. Under clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for this bill from the Director of the Congressional Budget Office:

H.R. 4282—Native Hawaiian Government Reorganization Act of 2004

H.R. 4282 would establish a process for a Native Hawaiian government to be constituted and recognized by the federal government. CBO estimates that implementing H.R. 4282 would cost nearly $1 million annually in fiscal years 2005–2007 and less than $500,000 in each subsequent year, assuming the availability of appropriated funds. Enacting the bill would not affect direct spending or revenues.

H.R. 4282 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments. Enacting this legislation could lead to the creation of a new government to represent Native Hawaiians. The transfer of any land or other assets to this new government, including land now controlled by the state of Hawaii, would be the subject of future negotiations.

The bill would establish the United States Office for Native Hawaiian Relations within the Department of the Interior (DOI) to consult and coordinate the relationship with the Native Hawaiian governing entity. Based on information from DOI, CBO expects this office would require up to three full-time personnel. H.R. 4282 also would establish the Native Hawaiian Interagency Coordinating Group, consisting of officials from interested agencies. Finally, the bill would create a nine-member commission responsible for creating and certifying a roll of adult Native Hawaiians. Based upon information from DOI, CBO expects that this commission would need three years and three full-time staff to complete its work.

On May 30, 2003, CBO transmitted a cost estimate for S. 344, the Native Hawaiian Recognition Act of 2003, as ordered reported by the Senate Committee on Indian Affairs, on May 14, 2003. On May 3, 2004, CBO transmitted a cost estimate for S. 344 as ordered reported by the Senate Committee on Indian Affairs on April 21, 2004. Both versions of S. 344 are similar to H.R. 4282; however, CBO estimates that implementing H.R. 4282 would have a higher cost because it would authorize the commission that would be tasked to create and certify a roll of Native Hawaiians to hire full-time staff and to procure temporary services.

The CBO staff contacts for this estimate are Mike Waters (for federal costs) and Marjorie Miller (for the impact on state, local, and tribal governments). This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

COMPLIANCE WITH PUBLIC LAW 104–4

This bill contains no unfunded mandates.

PREEMPTION OF STATE, LOCAL OR TRIBAL LAW

This bill is not intended to preempt any State, local or tribal law.

CHANGES IN EXISTING LAW

If enacted, this bill would make no changes in existing law.

ADDITIONAL VIEWS

The purpose of H.R. 4282 is to authorize a process for the reorganization of the Native Hawaiian government and for the reaffirmation by the United States of the special political and legal relationship between the United States and the Native Hawaiian governing entity for purposes of carrying on a government-to-government relationship with the Native Hawaiian government. This relationship is legally analogous to the special relationship that exists between the United States and Indian tribal governments under the Indian Commerce Clause of the United States Constitution and other authorities.

However, H.R. 4282 reflects a new paradigm in which the Native Hawaiian government, the State of Hawai'i, and the United States will have the flexibility to develop—through a process of negotiations—a structured framework for the governmental powers and authorities, including civil and criminal jurisdiction, that will be exercised by each government. Thereafter, it is anticipated that the governmental parties will seek legislation to implement their agreements, including amendments to existing State and Federal laws, as well as necessary amendments to the State's constitution. To this end, the legislation does not import wholesale the existing body of Federal Indian Law, but instead contemplates that the governmental parties to these negotiations will shape their relationships, and their rights and responsibilities, in a manner that is appropriate to contemporary circumstances in the State of Hawai'i while remaining within the broad framework of a government-to-government relationship with the United States.

Historical background

On January 17, 1863, the government of the Kingdom of Hawai'i was overthrown by a group of American citizens and others, who acted with the support of U.S. Minister John Stephens and a contingent of U.S. Marines from the U.S.S. *Boston*. Supporters of this revolutionary movement organized a government calling itself the Republic of Hawaii, which was later recognized by the United States as the government of the Hawaiian Islands. Notwithstanding strong opposition from within the Native Hawaiian community, officials of the Republic of Hawai'i successfully sought to have the Hawaiian Islands annexed by the United States. In August 1898, Congress adopted the Joint Resolution for Annexing the Hawaiian Islands to the United States.[1] Soon thereafter, Congress passed the Hawai'i Organic Act,[2] establishing a government for the newly created Territory of Hawai'i. In 1959, Hawai'i was admitted to the Union as the Fiftieth State.[3]

[1] 30 Stat. 750 (August 12, 1898).
[2] 31 Stat. 141 (April 30, 1900).
[3] Hawaii Admission Act, Pub. L. 86–3, 73 Stat. 4 (March 18, 1959).

One hundred years after the U.S.-supported overthrow of the Kingdom of Hawai'i, a resolution extending an apology on behalf of the United States to Native Hawaiians for the illegal overthrow of the Native Hawaiian government and calling for a reconciliation of the relationship between the United States and Native Hawaiians was enacted into law.[4] The Apology Resolution acknowledges that the overthrow of the Kingdom of Hawai'i occurred with the active participation of agents and citizens of the United States and further acknowledges that the Native Hawaiian people never directly relinquished to the United States, their claims to their inherent sovereignty as a people over their national lands, either through their government or through a plebiscite or referendum.

Federal legislation on behalf of Native Hawaiians

Since 1910, Congress has enacted into law more than 160 statutes which, in whole or in part, establish programs and services intended to address the special circumstances of Native Hawaiians. Congress first explicitly recognized the existence of a special or trust relationship between the Native Hawaiian people and the United States with the enactment in 1921 of the Hawaiian Homes Commission Act.[5]

Proponents of the Hawaiian Homes Commission Act noted the decreasing numbers and poor economic status of Native Hawaiians. Prior to European contact, it was estimated that there were 400,000 Native Hawaiians in the Hawaiian Islands. By 1919, the Native Hawaiian population had been reduced to 22,600, and many were concluding that the native people of Hawai'i were a "dying race," and that if they were to be saved from extinction, they must have the means of regaining their connection to the land, the 'aina. In hearings on the Hawaiian Homes Commission Act, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised: "One thing that impressed me * * * was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty."[6]

Prince Jonah Kuhio Kalanianaole, the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do today, this splendid race of people, my people, will pass from the face of the earth."[7] Secretary Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[8]

The Hawaiian Homes Commission Act set aside approximately 203,500 acres of public lands (former Crown and Government lands ceded by the Republic of Hawai'i to the United States upon Annexation) for homesteading by Native Hawaiians. The Act provides that the lessee must be a Native Hawaiian, who is entitled to a lease for a term of ninety-nine years, provided that the lessee occu-

[4] Pub. L. 103–150, 107 Stat. 1510 (November 23, 1993) (the "Apology Resolution").
[5] 42 Stat. 108 (July 9, 1921).
[6] H.R. Rep. No. 66–839, at 4 (1920).
[7] 59 Cong. Rec. 7453 (1920).
[8] H.R. Rep. No. 66–839, at 5.

pies and uses or cultivates the tract within one year after the lease is entered into. A restriction on alienation, like those imposed on Indian lands subject to allotment, was included in the lease. Also like the general allotment acts affecting Indians, the leases were intended to encourage rural homesteading so that Native Hawaiians would leave the urban areas and return to rural subsistence or commercial farming and ranching. In February, 1923, the Congress amended the Act to authorize one-half acre residence lots and to provide for home construction loans. Thereafter, the demand for residential lots far exceeded the demand for agricultural or pastoral lots.

In enacting the Hawaiian Homes Commission Act, Congress compared the legislation to "previous enactments granting Indians * * * special privileges in obtaining and using the public lands."[9] In testimony before Congress, Interior Secretary land explicitly analogized the relationship between the United States and Native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that special programs for Native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for Indians.[10]

Congress again recognized the special status of Native Hawai'ians when Hawai'i gained Statehood in 1959. As a condition of admission into the Union, section 4 of the Hawai'i Admission Act required the new State to assume management of the homesteading program established under the Hawaiian Homes Commission Act and to adopt that Federal law, as amended, as a provision of its Constitution. The Admission Act imposed a public trust on the lands which were ceded to the United States by the Republic of Hawai'i upon annexation by the United States in 1898 and which were conveyed to the State of Hawai'i in trust upon its admission into the Union of States, requiring the State to manage these lands and any revenues derived from them, for five specified purposes, one of which was "the betterment of the conditions of native Hawai'ians, as defined in the Hawai'ian Homes Commission Act, 1920, as amended."[11] The Admission Act further provided that the use of these lands and revenues for any use other than the five specified uses "shall constitute breach of trust for which suit may be brought by the United States."[12]

The Hawai'i Admission Act provided for explicit delegations of Federal authority to be assumed by the new State and mandated that the State act as a trustee for Native Hawai'ians. The United States did not absolve itself from all further responsibility in the administration or amendment of the Hawai'ian Homes Commission

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[9] H.R. Rep. No. 66–839, at 11 (1920).

[10] Hearings before the Committee on the Territories, House of Representatives, 66th Cong., 2d Sess., on Proposed Amendments to the Organic Act of the Territory of Hawaii, February 3, 4, 5, 7, and 10, 1920, at 129–30 (statement of Secretary Lane that "[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world," and rejecting the argument that legislation aimed at "this distinct race" would be unconstitutional because "it would be an extension of the same idea" as that established in dealing with Indians); see also id. at 127 (colloquy between Secretary Lane and Representative Monahan, analogizing status of Native Hawaiians to that of Indians), and at 167–70 (colloquy between Representative Curry, Chair of the Committee, and Representatives Dowell, and Humphreys, making the same analogy and rejecting the objection that "we have no government or tribe to deal with here").

[11] Hawai'i Admission Act, § 5(f).

[12] Id.

Act, nor did it divest itself of an ongoing role in overseeing the use of ceded lands and the income or proceeds therefrom. Sections 4 and 5 of the Hawai'i Admission Act clearly contemplate a continuing Federal role, as do sections 204 and 223 of the Hawai'ian Homes Commission Act, which provide that the consent of the Secretary of the Interior must be obtained for certain exchanges of trust lands and reserved to Congress the right to amend that Act. The Federal and State courts have repeatedly concluded that the United States retains the authority to bring an enforcement action against the State of Hawai'i for breach of the trust responsibilities set forth in section 5 of the Admission Act,[13] and these responsibilities are enforceable by the Native Hawai'ian beneficiaries themselves.[14]

Over the last 30 years, Congress has included Native Hawaiians in numerous Federal statutes designed to address the conditions of Native Americans, including for example, the Native American Programs Act of 1974,[15] the Native American Housing Assistance and Self-Determination Act,[16] the National Museum of the American Indian Act,[17] the Native American Languages Act,[18] the Native American Graves Protection and Repatriation Act,[19] and the National Historic Preservation Act Amendments of 1992,[20] and has enacted other statutes dealing with the specific circumstances of Native Hawaiians such as the Native Hawaiian Study Commission Act,[21] the Native Hawaiian Health Care Improvement Act of 1988,[22] and the Native Hawaiian Education Act.[23]

Acting in furtherance of the Hawai'i Admission Act's partial delegation of Federal responsibility for Native Hawaiians, in 1978, the citizens of the State of Hawai'i recognized the long-standing efforts of the native people to give expression to their rights to self-determination and self-governance by amending the State constitution to provide for the establishment of a quasi-independent State agency, the Office of Hawaiian Affairs. The Hawai'i Constitution provides that the Office is to be governed by nine trustees who are Native Hawaiian and who are to be elected by Native Hawaiians. The Office administers programs and services with revenues derives from lands ceded to the United States by the Republic of Hawai'i in 1898 and which were conveyed to the State of Hawai'i in trust upon its admission into the Union of States pursuant to section 5 of the Hawaii Admission Act. The dedication of these revenues reflects the provision of section 5 of the Admission Act, which provides that the ceded lands and the revenues derived therefrom

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[13] See e.g., *Han* v. *United States,* 45 F.3d 333 (9th Cir. 1995).

[14] See, e.g., *Keaukaha-Panaewa Community Ass'n* v. *Hawai'ian Homes Comm'n,* 739 F2d 1467 (9th Cir. 1984) (Section 5(f) of the Hawai'i Admission Act, setting aside lands held in trust under the Hawai'ian Homes Commission Act, creates a Federal right in the Native Hawai'ian beneficiaries enforceable prospectively against the State of Hawai'i under 42 U.S.C. § 1983); *Napeahi* v, *Paty,* 921 F.2d 897 (9th Cir. 1990), cert denied, 502 U.S. 901 (1991) (same, concerning lands which were assets of the land trust created under Section 5(f) of the Hawai'i Admission Act but which were not Hawai'ian Home Lands).

[15] Pub. L. No. 93–644, § 801, 88 Stat. 2291, 2324 (January 4, 1975).

[16] Pub. L. No. 106–569, 114 Stat. 2944 (December 27, 2000).

[17] Pub. L. No. 101–185, 103 Stat. 1336 (November 28, 1989).

[18] Pub. L. No. 101–477, §§ 101–104, 104 Stat. 1152, 1154 (October 30, 1990).

[19] Pub. L. No. 101–601, 104 Stat. 3048 (November 16, 1990).

[20] Pub. L. No. 102–575, §§ 4002, 4006, 106 Stat. 4600, 4753 (October 30, 1992).

[21] Pub. L. No. 96–565, §§ 301–307, 94 Stat. 3321, 3224–27 (December 22, 1980).

[22] Pub. L. No. 100–579, 102 Stat. 2916 (October 31, 1988).

[23] Pub. L. 103–382, sec. 101, § 9201–9212, 108 Stat. 3518, 3794 (October 20, 1994).

should be held by the State of Hawai'i as a public trust for five purposes—one of which is the betterment of the conditions of Native Hawaiians.

On February 23, 2000, the United States Supreme Court issued a ruling in the case of *Rice* v. *Cayetano,* 528 U.S. 495 (2000). The Supreme Court held that because the Office of Hawaiian Affairs is an agency of the State of Hawai'i, funded in part by appropriations made by the State legislature, the Fifteenth Amendment to the United States Constitution requires that the election for the trustees of the Office of Hawaiian Affairs must be open to all citizens of the State of Hawai'i who are otherwise eligible to vote in statewide elections. Accordingly, all citizens of the State of Hawai'i may vote for the candidates for the nine trustee positions and, as decided in subsequent litigation, may themselves be candidates for these offices.

The native people of Hawai'i have thus been divested of the mechanism that was established under theHawai'i State Constitution that, since 1978, has served as one means of giving expression to their rights as indigenous, native people of the United States to self-determination and self-governance. H.R. 4282 is designed to address these developments by providing a means under Federal law, consistent with the Federal policy of self-determination and self-governance for America's indigenous, native people, for Native Hawaiians to have a status similar to that of the other indigenous, native people of the United States.

The United States' special relationship with Native Americans

For the past two hundred and ten years, the United States Congress, the Executive Branch, and the U.S. Supreme Court have recognized certain legal rights and protections for America's indigenous peoples. Since the founding of the United States, Congress has exercised a constitutional authority over indigenous affairs and has undertaken an enhanced duty of care for America's indigenous peoples. This has been done in recognition of the sovereignty possessed by the native people—a sovereignty which pre-existed the formation of the United States. The Congress' exercise of its constitutional authority is also premised upon the status of the indigenous people as the original inhabitants of this nation who occupied and exercised dominion and control over the lands over which the United States subsequently acquired jurisdiction.

The United States has long recognized the existence of a special political relationship with the indigenous people of the United States. As Native Americans—American Indians, Alaska Natives, and Native Hawaiians—American Indians, Alaska Natives, and Native Hawaiians—the United States has recognized that they are entitled to special rights and considerations, and the Congress has enacted laws to give expression to the respective legal rights and responsibilities of the Federal government and the native people. As the United States Supreme Court recognized in *Morton* v. *Mancari,*[24] recognition of a group of Native Americans as one with which the United States recognizes a special relationship is a dis-

[24] 427 U.S. 535 (1974).

tinction that is "political rather than racial in nature,[25] and legislation providing a preference for members of such groups does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution where "the special treatment can be tied rationally to the fulfillment of Congress' unique obligations toward the Indians[.][26]

As the United States Supreme Court has recently noted, the power of Congress to address the conditions of the native people of the United States stems not only from the Indian Commerce Clause, U.S. Const., Art. I, § 3, cl. 8,[27] but rests also "upon the Constitution's adoption of pre-constitutional powers necessarily inherent in any Federal Government, namely powers that [the U.S. Supreme] Court has described as 'necessary concomitants of nationality.'"[28]

The United States Supreme Court has so often addressed the scope of Congress' constitutional authority to address the conditions of native people that it is now well-established.[29] The Court has characterized the authority of Congress as "plenary"[30] or as "plenary and exclusive,"[31] and has frequently stated its views regarding the broad scope of Congressional authority regard to native people[32] and other "dependent sovereign[s] that [are] not * * * state[s]."[33] Nor is this power limited to the native people living

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[25] Id., 427 U.S. at 553 n.24.

[26] Id., at 554.

[27] Although "[t]he treaty power does not literally authorize Congress to act legislatively [with regard to Native Americans]." *United States.* v. *Lara,* 124 S.Ct. 1628, 1633 (2004), the U.S. Supreme Court "has explicitly stated that the statute [ending the practice of entering into treaties with the Indian tribes] 'in no way affected Congress' plenary powers to legislate on problems of Indians:" Id., 124 S.Ct. At 1634 (quoting *Antoine* v. *Washington,* 420 U.S. 194, 203 (1975)).

[28] Lara, 124 S.Ct. at 1634 (citing *United States* v. *Curtiss-Wright Export Corp.,* 299 U.S. 304, 315–22 (1936), and L. Henkin, Foreign Affairs and the U.S. Constitution 14–22, 63–72 (2d ed. 1996).

[29] "The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection. As well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States * * * From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them, and the treaties in which it has been promised, there arises a duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen." *United States* v. *Kagama,* 118 U.S. 375 (1886).

[30] *Morton* v. *Mancari,* 427 U.S. 535 (1974).

[31] *Lara,* 124 S.Ct. at 1633 (citing, e.g., *Washington* v. *Confederated Bands and Tribes of Yakima Nation,* 439 U.S. 463, 470–71 (1979), and *Negonsett* v. *Samuels,* 507 U.S. 99, 103 (1993)).

[32] *Delaware Tribal Business Council* v. *Weeks,* 430 U.S. 73 (1977); *United States* v. *Sioux Nation,* 448 U.S. 371 (1980). The rulings of the Supreme Court make clear that neither the conferring of citizenship upon the native people, the allotment of their lands, the lifting of restrictions on alienation of native land, the dissolution of a tribe, the emancipation of individual native people, the fact that a group of natives may be only a remnant of a tribe, the lack of continuous Federal supervision over the Indians, nor the separation of individual Indians from their tribes would divest the Congress of its constitutional authority to address the conditions of the native people. *Cherokee Nation* v. *Hitchock,* 187 U.S. 294 (1902); *United States* v. *Celestine,* 215 U.S. 278 (1909); *Tiger* v. *Western Inv. Co.,* 221 U.S. 286 (1911); *United States* v. *Nice,* 241 U.S. 591 (1916); *Chippewa Indians* v. *United States,* 307 U.S. 1 (1939); *Delaware Tribal Business Council* v. *Weeks,* 430 U.S. 73 (1977); *United States* v. *John,* 437 U.S. 634 (1979).

[33] *Lara,* 124 S.Ct. at 1635 (noting the "annexation of Hawaii by joint resolution of Congress and the maintenance of a "Republic of Hawaii" until formal incorporation by Congress, as described in *Hawaii* v. *Mankichi,* 190 U.S. 197, 209–210 (1903), the establishment of the Northern Mariana Islands as "a self-governing commonwealth * * * in political union with and under the sovereignty of the United States" pursuant to note following 48 U.S.C. § 1801 [see also Pub. L. 94–241, 90 Stat. 263 (Mar. 24, 1976)], the recognition of the Philippine Islands as an independent nation pursuant to 22 U.S.C. § 1394, and the authorization granted the people of Puerto Rico to "organize a government pursuant to a constitution of their own adoption" pursuant to the Act of July 3, 1950, 64 Stat. 319).

within the territory of the original thirteen states—it also extends to those living in lands that have been subsequently acquired.[34] With regard to the power of Congress to make "major changes in the metes and bounds of tribal sovereignty," [35] the particular power Congress seeks to exercise here in the case of Native Hawaiians, the Court has stated:

> One can readily find examples in congressional decisions to recognize, or to terminate, the existence of individual tribes. See *United States* v. *Holliday,* 3 Wall. 407, 419 (1866) ("If by [the political branches] those Indians are recognized as a tribe, this court must do the same"); *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968) (examining the rights of Menominee Indians following the termination of their Tribe). Indeed, Congress has restored previously extinguished tribal status—by a re-recognizing a Tribe whose tribal existence it previously had terminated. 25 U.S.C. §§ 903–903f (restoring the Menominee Tribe); cf. *United States* v. *Long,* 324 F.3d 475 (CA7) (upholding against double jeopardy challenge successive prosecutions by the restored Menominee Tribe and the Federal Government), cert. denied, 540 U.S. ____, 124 S.Ct. 151 (2003).[36]

While the Indian Commerce Clause of the U.S. Constitution provides authority for the Congress to conduct relations with the Indian tribes, over time the exercise of that authority has evolved to include the enactment of laws which address the conditions of individual Indians, individual indigenous native people, and groups of native people who are not organized as tribes. For instance, the federal policy of forced removal of Indians from their ancestral lands to areas west of the Mississippi was carried out without regard to tribal organization, and later, the General Allotment Act [37] and other laws were enacted to provide for the termination of Indian reservation status and the allotment of lands to individual Indians.

The Alaska Native Allotment Act of 1906 [38] provided for similar allotment of native lands to individual Alaska Natives, without regard to tribal organization.

In the states of California, Montana, and Washington, to name but a few, individual Indians were removed to designed reservations and were forced to live with other Indians who were not members of the same tribe. In the 1960s, the Federal policy of relocating Indians to urban areas was also carried out without regard to tribal organization. The Alaska National Interest Lands Conservation Act [39] authorized a preference for subsistence hunting and fishing by Alaska Natives, notwithstanding the fact that not all Alaska Natives were organized as tribes, and the Alaska Native Claims Settlement Act [40] (ANCSA) authorized the establishment of native regional and village corporations in which Alaska Natives

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[34] *United States* v. *Sandoval,* 231 U.S. 28 (1913).
[35] *Lara,* 124 S.Ct. at 1635.
[36] Id.
[37] 24 Stat. 388 (February 8, 1887).
[38] 34 Stat. 197 (May 17, 1906).
[39] Pub. L. 96–487, 94 Stat. 2371 (Dec. 2, 1980).
[40] Pub. L. 92–203, 85 Stat. 688 (December 18, 1971).

would be the principal shareholders and the corporations would hold title to the surface and subsurface estates of lands selected by Alaska Native corporations under that Act, without regard to whether the native shareholders were members of an Indian tribe. ANCSA singled out the indigenous, native people for a unique status and the rights and privileges which flowed from that status, as distinct from other citizens of Alaska.

A more recent manifestation of Congress' broad constitutional authority to address the conditions of the indigenous, native people of the United States is the Federally Recognized Indian Tribes List Act of 1994 [41]—which designated as "tribes" for purposes of carrying on relations with the United States a number of groups of native people who were not previously organized as tribes, and in some cases who are still not organized as tribes.

Furthermore, it is clear that the Congress has exercised its constitutional authority to terminate the federal government's recognition of tribal status, to restore federal recognition of tribal status, and indeed to authorize the indigenous, native people to come together to reorganize their governments. The Indian Reorganization Act of 1934 [42] was one of the federal statutes that provided this native governmental reorganization authority, and that Act did not impose any time-related conditions requiring, for instance, that a native government could only reorganize if its Federally recognized status had been terminated within a certain number of years, nor did that Act require that the indigenous, native people seeking to reorganize a native government had to have been formerly recognized by the Federal government as an Indian tribe.

With regard to the period of time between termination and restoration of the Federally recognized status of tribal groups, while the average amount of time between termination and restoration ranges from 19 to 36 years,[43] the efforts to secure restoration of Federally recognized status took much longer in other instances—such as the 55 years between termination and restoration experienced by the Pokagon Band of Potawatomi Indians of Michigan.[44] Federal law has never provided that upon the passage of a designated period of time, a native government is precluded from reorganizing. Thus the indigenous, native people of Hawai'i are not precluded from reorganizing a government based on the passage of time.

H.R. 4282 and the federal recognition of Native Hawaiians

With the enactment of the Hawaiian Homes Commission Act in 1921 and subsequent legislation, Congress has exercised its broad powers under the Indian Commerce Clause to recognize Native Hawaiians as among the indigenous people of the United States with

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[41] Pub. L. 103–454, 108 Stat. 4791 (November 2, 1994).

[42] 48 Stat. 984 (June 18, 1934).

[43] Menominee, Restoration Act, Pub. L. 93–197; Auburn Indian Restoration, Pub. L. 104–109; Siletz Indian Tribe Restoration Act, Pub. L. 96–340; Yslete del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. 103–437; Paskenta Band Restoration Act, Pub. L. 103–454; Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. 103–116; Ponca Restoration Act, Pub. L. 101–484; Coquille Restoration Act, Pub. L. 101–42; Klamath Indian Tribe Restoration Act, Pub. L. 99–398; Confederated Tribes of the Grand Ronde Community of Oregon Restoration Act, Pub. L. 98–165; Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96–227.

[44] Pokagon Band of Potawatomi Indians Restoration Act, Pub. L. 103–323.

whom it maintains a special legal and political relationship. It is significant that the United States recognized this relationship within less than 25 years of the annexation of Hawai'i to the United States, a period much shorter than, for example, the 55-year break in Federally-recognized status experienced by the Pokagon Band. The restoration of the United States' recognition of a Native Hawaiian governing entity contemplated in this Act is well within the constitutional powers of the Congress, just as is the restoration of Federal recognition of the Menominee Tribe, and the fact that recognition of Native Hawaiians has taken a form different from that bywhich Indian tribes within the 48 contiguous states have been recognized is without constitutional significance.

H.R. 4282 provides a process of negotiations in which the Native Hawaiian governing entity, the State of Hawai'i, and the United States can reach consensus on matters of civil and criminal jurisdiction, land use regulatory authority, the transfer or exchange of lands and natural resources, and the full range of issues that each of these governments may wish to consider in shaping their future relationships as governments, including any outstanding land claims. The bill provides that once consensus is reached, the three governments will bring their agreements to the Congress and to the Legislature of the State of Hawai'i so that implementing legislation can be enacted, and existing laws can be appropriately amended.

In a manner analogous to the Alaska Native Claims Settlement Act, H.R. 4282 establishes a new and different paradigm which, like other Native settlements acts, authorizes the three governments to have implementing legislation enacted and thereby to add to the body of Federal laws that are designed to address the conditions of America's indigenous, native people rather than importing into their relationships—without adaptation to address the unique circumstances of Hawai'i—the body of existing Federal Indian laws.

Conclusion

The primary injury that H.R. 4282 is intended to address is the loss of a sovereign governing entity resulting from the 1893 overthrow of the government of the Kingdom of Hawai'i, an event made possible by the actions of officials and citizens fo the United States. Although Congress has consistently recognized Native Hawaiians as among the native people of the United States on whose behalf it may exercise its powers under the Indian Commerce Clause, it has not as yet acted to provide a process for the reorganization of a Native Hawaiian sovereign governing entity. H.R. 4282 provides authority for that process.

NEIL ABERCROMBIE.

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